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Domestic Relations

Domestic Relations; paternity—blood tests

Evidence Code §895 (amended).

AB 123 (Stirling); STATS. 1981, Ch 266

Support: Attorney General; California District Attorney's Association; Department of Social Services; National Organization for Women

Opposition: American Civil Liberties Union; Western Center on Law and Poverty

Existing law provides that when paternity is at issue in a civil action the court must, upon motion of either party, order the mother, child, and alleged father to submit to blood tests.¹ Historically, blood test results were admissible into evidence only for the purpose of proving *non*-paternity.² This policy of excluding test evidence offered to affirmatively establish paternity was the result of judicial interpretation of legislative intent.³ The Court of Appeal in *Dodd v. Henkel* noted that, in adopting the Uniform Act on Blood Tests to Determine Paternity, the California Legislature omitted certain language that would have permitted the introduction of the results of blood tests as affirmative evidence of paternity.⁴ Therefore, the court reasoned, the Legislature intended to provide for the use of blood test evidence only to disprove the possibility of paternity.⁵

In recent decisions, however, California courts have taken judicial notice of more advanced and significantly more accurate techniques for blood testing, particularly the Human Leucocyte Antigen test (hereinafter referred to as HLA).⁶ The Court of Appeal in *Cramer v. Morrison* noted that "the drafters of the Uniform Act did not have in mind tests

1. See CAL. EVID. CODE §892 (in addition, the court may order the tests *sua sponte*).

2. See, e.g., *Dodd v. Henkel*, 84 Cal. App. 3d 604, 607-10, 148 Cal. Rptr. 780, 781-83 (1978); *Hodge v. Gould*, 274 Cal. App. 2d 806, 808, 79 Cal. Rptr. 245, 246 (1969). See generally B. WITKIN, CALIFORNIA EVIDENCE *Blood Test for Non-Paternity* §§657-660 (2d ed. 1966).

3. See 84 Cal. App. 3d at 609-10, 148 Cal. Rptr. at 782-83.

4. See *id.* Compare 9 U.L.A. 110 (1957 ed.) with CAL. STATS. 1953, c. 1426, §1, at 3013 (originally codified as CAL. CIV. PROC. CODE §§1980.1-1980.7, now CAL. EVID. CODE §§890-897).

5. See 84 Cal. App. 3d at 609-10, 148 Cal. Rptr. at 782-83.

6. See *Cramer v. Morrison*, 88 Cal. App. 3d 873, 879-82, 153 Cal. Rptr. 865, 868-70 (1979). See generally A.M.A. Committee on Transfusion and Transplantation with A.B.A. Section on Family Law, *Joint A.M.A.-A.B.A. Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247 (1976) [hereinafter cited as A.M.A.-A.B.A. Report].

of the nature of the HLA"⁷ and rejected precedent by ruling that blood tests as reliable as the HLA test are admissible as evidence to affirmatively show paternity.⁸

Chapter 266 codifies the decision in *Cramer* by no longer limiting blood tests to their probative value in establishing non-paternity.⁹ Chapter 266 provides that if the alleged father is exonerated by the blood test results, the court, in its discretion, may submit the test results to the jury for consideration along with the other evidence in the case; for example, the fact of intercourse and the probable time of conception.¹⁰

COMMENT

Chapter 266 represents a change in legislative policy resulting from the availability of more accurate methods of blood testing. When California originally adopted its version of the Uniform Act in 1953, the Landsteiner series of red blood cell classifications (ABO, MN, Rh)¹¹ were the accepted standard tests used in California to determine the possibility of paternity.¹² The probability of exonerating a wrongly accused man by the use of red blood cell classifications alone is poor;¹³ a man who is not positively excluded from consideration on the basis of red blood cell type is only one among a great number of the population that could be the father.¹⁴ On the other hand, the Human Leucocyte Antigen test, which involves tissue typing of white blood cells, when employed together with the standard red blood cell tests, increases the probability of excluding non-fathers to above 90%.¹⁵

When blood test results are offered by a party as evidence establishing the probability of paternity, Chapter 266 requires the court to weigh the probative value of the test results against the likelihood that their admission will create undue prejudice or confusion to the jury or

7. See 88 Cal. App. 3d at 880, 153 Cal. Rptr. at 869.

8. Compare *id.* at 882, 153 Cal. Rptr. at 870 with 84 Cal. App. 3d at 609-10, 148 Cal. Rptr. at 782-83.

9. Compare CAL. EVID. CODE §895 with CAL. STATS. 1953, c. 1426, §1, at 3013 (enacting CAL. CIV. PROC. CODE §1980.6).

10. See CAL. EVID. CODE §§352, 895.

11. See generally L. SUSSMAN, PATERNITY TESTING BY BLOOD GROUPING (2d ed. 1976) [hereinafter cited as SUSSMAN].

12. See 88 Cal. App. 3d at 880-81, 153 Cal. Rptr. at 869.

13. See SUSSMAN, *supra* note 11, at 8-9 (the chance of exclusion achievable by all red blood cell tests combined is approximately 67%). See generally A.M.A.-A.B.A. Report, *supra* note 6, at 262 (probability calculations of 80% or less are not useful).

14. See SUSSMAN, *supra* note 11, at 128; A.M.A.-A.B.A. Report, *supra* note 6, at 262.

15. See Beautyman, *Paternity Actions—A Matter of Opinion or a Trial of the Blood?*, 4 J. OF LEGAL MED., 17, 19 (Apr. 1976).

undue consumption of time.¹⁶ The court must then exercise its discretion and either admit or exclude the evidence.¹⁷ Since blood test evidence was inadmissible when only the Landsteiner test series was available,¹⁸ it may be an abuse of discretion for the court to admit blood test evidence to establish paternity when the HLA test or a test of similar accuracy has not been performed.¹⁹

16. See CAL. EVID. CODE §§352, 895.

17. See *id.* §§352, 895.

18. See text accompanying note 2 *supra*.

19. See generally Polesky & Krause, *Blood Typing in Disputed Paternity Cases—Capabilities of American Laboratories*, 10 FAM. L.Q. 287, 291-92 (1976) (only 17% of American hospitals surveyed were equipped to perform HLA testing).

Domestic Relations; legitimacy—motions for blood tests

Evidence Code §621 (amended).

AB 207 (Stirling); STATS. 1981, Ch 1180

Support: Department of Social Services

Under existing law, the child of a wife living with her husband is conclusively presumed¹ to be a child of the marriage unless the husband is impotent or sterile.² If a court finds, however, that the conclusions of all the experts, based upon blood test results, are that the husband is *not* the father, the court may resolve the question of paternity notwithstanding the presumption.³

Prior to the enactment of Chapter 1180, a motion for an order instructing the parties to submit to blood tests could be raised by the husband only.⁴ Chapter 1180 authorizes the mother of the child to raise the motion for blood tests if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.⁵ In either case, the issue of paternity must be presented within two years after the date of the child's birth.⁶

Chapter 1180 specifies that blood test evidence is applicable to rebut the presumption that a child is a child of the mother's marriage only in

1. See 6 CAL. PRACTICE §44:5, at 185 (1980) (conclusive presumptions are irrebuttable by any evidence).

2. CAL. EVID. CODE §621(a).

3. *Id.* §621(b). See generally 13 PAC. L.J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 671 (1982).

4. CAL. STATS. 1980, c. 1310, §1, at —. See generally 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 369 (1981).

5. CAL. EVID. CODE §621(d).

6. See *id.* §621(c), (d).

cases that have not reached final judgment by September 30, 1980.⁷ Apparently, a mother bringing an action to dispute paternity⁸ who was foreclosed from raising a motion for blood tests may have an unfavorable judgment vacated, based on the provision in Chapter 1180 granting standing to raise the motion, if the judgment was rendered subsequent to September 30, 1980.⁹

7. *See id.* §621(g).

8. *See* CAL. CIV. CODE §7006(a)(2) (giving the mother standing to bring an action disputing paternity).

9. *See* CAL. EVID. CODE §621(g).

Domestic Relations; orders for support

Civil Code §4801.7 (amended); Code of Civil Procedure §674.5 (amended).

AB 1982 (Moorhead); STATS. 1981, Ch 822

Under prior law, if a party entitled to receive court-ordered spousal support was a welfare recipient, the court was required to order the support paid directly to the county clerk or other county officer.¹ In addition, the district attorney was required to appear on behalf of the welfare recipient in any proceeding required to enforce the order.² In all cases when the party is not a welfare recipient, existing law allows the court, in its discretion, to still direct payment to be made to a county officer³ and to direct the district attorney to appear on behalf of the recipient.⁴ Chapter 822 gives the court discretion to require payments to be made to a county officer in *all* cases, including cases where the recipient is on welfare.⁵ When the court has ordered any support payments to be paid directly to a county officer, the court may refer the matter of enforcement to the district attorney,⁶ and the district attorney may, at its discretion, bring any enforcement proceedings that it considers appropriate.⁷ Chapter 822 also provides that the district attorney may enforce any order for spousal support whether or not there has been a referral by the court.⁸ When the district attorney is required to

1. CAL. STATS. 1980, c. 866, §2, at — (adding CAL. CIV. CODE §4801.7).

2. *Id.*; *see* 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 370, 375 (1981) (child and spousal support).

3. CAL. CIV. CODE §4801.7(a).

4. *Id.* §4801.7(b).

5. *Compare id.* §4801.7(a) with CAL. STATS. 1980, c. 866, §2, at —.

6. CAL. CIV. CODE §4801.7(b).

7. *Id.*

8. *Id.*

bring an action to enforce payments of a *child* support order on behalf of a welfare recipient, and the welfare recipient is also entitled to spousal support payments that are in arrears, Chapter 822 requires the district attorney also to enforce the spousal support order.⁹

Chapter 822 also provides that when the court orders spousal support payments to be made directly to a county officer, the court may include in the order a reasonable service charge.¹⁰ Where expenses of the county or the district attorney exceed the applicable service charge, these expenses will be a charge on the county where the proceedings are pending.¹¹

Under existing law, when a judgment for spousal support is recorded with the county, the recording becomes a lien on all real property owned by the judgment debtor (hereinafter referred to as debtor).¹² In addition, existing law specifies that when a debtor issues and records a certificate, under penalty of perjury, that all payments that have matured have been fully paid and satisfied, the certificate will be prima facie evidence conclusive in favor of any person dealing in good faith and for valuable consideration with the debtor.¹³ Chapter 822 requires that the certificate of the debtor, in order to be conclusive in favor of a bona fide purchaser for value, *must* be accompanied by either (1) an affidavit by the judgment creditor (hereinafter referred to as creditor), signed under penalty of perjury, that all payments owed have been fully satisfied,¹⁴ or (2) proof that a copy of the debtor's certificate, has been served, at least ten days prior to recordation, on the creditor.¹⁵ The creditor must be served with a copy of the return receipt attached to the certificate of service.¹⁶ Chapter 822 requires service on the creditor to include a copy of the debtor's certificate and a notice¹⁷ informing the creditor that the debtor intends to record the certificate.¹⁸ The notice must also inform the creditor that he or she has ten days to file an affidavit of nonpayment to prevent the release of the lien, if the debtor is not current in payments.¹⁹ The affidavit of nonpayment must declare

9. *Id.* §4801.7(c).

10. *Id.* §4801.7(a); see CAL. WELF. & INST. CODE §§276, 279 (to determine the applicable service charge).

11. CAL. CIV. CODE §4801.7(d).

12. See CAL. CIV. PROC. CODE §674.5(a). See generally *Heller Properties, Inc. v. Rothschild*, 11 Cal. App. 3d 705, 90 Cal. Rptr. 133 (1970).

13. CAL. CIV. PROC. CODE §674.5(b).

14. *Id.* §674.5(c).

15. *Id.* (service by personal service or certified mail).

16. *Id.*

17. *Id.* (example of the proper notice form).

18. *Id.*

19. *Id.*

the matured accounts and installments which have not been paid by the debtor, and must be signed under penalty of perjury.²⁰ In order to prevent the release of the lien and to nullify the recorded certificate of the debtor, the affidavit of nonpayment must be recorded within ten days of the service of the unexecuted certificate of the debtor on the creditor.²¹ Any creditor affidavit recorded more than ten days after service will be without force and effect.²² Chapter 822 also establishes that, if a creditor knowingly records a false affidavit of nonpayment, the creditor will be liable to the debtor for all damages caused by the false affidavit, and any reasonable attorney's fees.²³

Under existing law, when the court orders child or spousal support payments made directly to a county officer, the debtor's certificate of payment will not remove the property lien unless it is approved in writing by the designated officer.²⁴ Chapter 822 provides that when approval of the county officer is needed to release the lien, the judgment debtor's certificate does not have to be accompanied by a certificate of payment from the creditor nor will any affidavit of the creditor affect the lien.²⁵

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* §674.5(d); *see* CAL. CIV. CODE §4702.

25. CAL. CIV. PROC. CODE §674.5(d).

Domestic Relations; vocational training examination

Civil Code §4801 (amended).

AB 2135 (Konnyu); STATS. 1981, Ch 514

Support: California State Bar Family Laws Section

When awarding support in an action for the dissolution of marriage, the court must consider certain circumstances including the ability of the supported spouse to engage in gainful employment.¹ In order to determine the spouse's ability to obtain employment,² Chapter 514 authorizes the court to order that the party seeking support submit to an

1. *See* CAL. CIV. CODE §4801(a)(5).

2. *See id.* §4801(a)(1), (5), (6), (f) (a vocational training consultant should have the knowledge necessary to determine the earning capacity of the spouse, the ability of the supported spouse to engage in gainful employment, and the time required for the supported spouse to acquire appropriate education).

examination by a vocational training consultant.³ The order, however, may be made only on motion for good cause shown,⁴ and notice to all parties, must specify the time, place, manner, and scope of the examination and the name of the examiner.⁵ Furthermore, Chapter 514 provides that a person who refuses to comply with the examination order will be subject to the same consequences as a person who fails to comply with an order for a physical or mental examination.⁶ These consequences include taking the matters of which questions were asked as established, prohibiting the noncomplying party from introducing evidence, striking the noncomplying party's pleadings, or rendering a default judgment.⁷

3. *Id.* §4801(e), (f) (vocational training consultant means an individual with sufficient knowledge, skill, experience, training, or education relating to interviewing, testing and analyzing work skills, planning courses of training and study, formulating career goals, and analyzing the work market to qualify as an expert in vocational training under California Evidence Code Section 720).

4. *See generally* CAL. CIV. PROC. CODE §2036 (showing of good cause).

5. CAL. CIV. CODE §4801(e).

6. *See id.* *See generally* CAL. CIV. PROC. CODE §2032(b)(1) (consequences for failure to comply with order for physical or mental examination).

7. *See* CAL. CIV. PROC. CODE §2034(b).

Domestic Relations; temporary restraining orders

Code of Civil Procedure §§527, 527.6, 546, 553 (amended); Penal Code §273.6 (amended).

AB 293 (Thurman); STATS. 1981, Ch 182

Support: California State Bar; Los Angeles City Attorney

Prior law required a temporary restraining order or preliminary injunction issued *ex parte* under the Family Law Act¹ or the Domestic Violence Prevention Act² to be made returnable for a show cause hearing³ on the earliest day the business of the court would allow, but not later than fifteen, or if good cause is shown, twenty days from the date of the order.⁴ Chapter 182 extends by five days the duration of a temporary restraining order or preliminary injunction issued under either of the above acts, requiring the order to be returnable not later than

1. *See* CAL. CIV. CODE §4359.

2. *See* CAL. CIV. PROC. CODE §546.

3. *See* CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §15.39 (1977).

4. *See* CAL. STATS. 1980, c. 1158, §7, at — (amending CAL. CIV. PROC. CODE §546). *See generally* 2 B. WITKIN, CALIFORNIA PROCEDURE *Provisional Remedies* §§46, 47, 83, 84, 85 (2d ed. 1970).

twenty days, or if good cause is shown, twenty-five days from the date of the order.⁵

Under prior law, the court had the discretion to appoint counsel or the district attorney to represent the plaintiff in a proceeding to enforce an injunction or a temporary restraining order issued under the Family Law Act.⁶ Chapter 182 deletes the authorization for court appointment of the district attorney.⁷ Chapter 182, however, charges the prosecuting agency⁸ of each county with the primary responsibility for enforcing injunctions and temporary restraining orders issued under certain sections of the Family Law Act⁹ and the Uniform Parentage Act.¹⁰

5. See CAL. CIV. PROC. CODE §§527, 546.

6. See CAL. STATS. 1979, c. 795, §10, at 2704 (amending CAL. CIV. PROC. CODE §553).

7. Compare CAL. CIV. PROC. CODE §553 with CAL. STATS. 1979, c. 795, §10, at 2713.

8. See conversation with Lonnie Gordon, District Attorney's office, Los Angeles, California. (The prosecuting agency may vary from county to county. In most cases it is the district attorney's office; but in Los Angeles, for example, the prosecuting agency is the city attorney's office.) (copy on file at the *Pacific Law Journal*).

9. See CAL. CIV. CODE §§4359, 4458, 4516; CAL. PENAL CODE §273.6(3)(b).

10. See CAL. CIV. CODE §§7020, 7021.

Domestic Relations; dissolution of marriage

Civil Code §4800.6 (repealed and new); §§4370, 4811 (amended).
SB 1199 (Marks); STATS. 1981 Ch 715

The Family Law Act details procedures for the dissolution of marriage.¹ Chapter 715 revises sections of the Family Law Act (hereinafter referred to as the Act) regarding attorney's fees, combined child support, and notice of community property liability.²

Prior to the enactment of Chapter 715 the authority of a court to order payment of attorney's fees or costs resulting from a proceeding under the Act was limited to the husband or wife or parents of the parties to the proceeding.³ Chapter 715 permits the court to order *any* party to the proceeding, except a governmental entity, to pay whatever amount may be necessary for the cost of maintaining or defending the proceeding and for attorney's fees on issues relating to that party.⁴ Chapter 715 apparently was enacted to prevent any benefit to the party

1. See generally CAL. CIV. CODE §§4000-5174.

2. See generally *id.*

3. See CAL. STATS. 1979, c. 1030, §2, at 3547 (amending CAL. CIV. CODE §4370). See also *In re Marriage of Reyes*, 97 Cal. App. 3d 876, 159 Cal. Rptr. 84 (1979).

4. See CAL. CIV. CODE §4370(a). See generally ATTORNEY'S FEE, TEMPORARY AWARD IN FAMILY LAW ACTIONS, 1980 CONFERENCE OF DELEGATES OF THE STATE BAR OF CALIFORNIA, Resolution 1-9-80.

better able to afford lengthy litigation.⁵ For example, existing law provides for the joinder of employee pension plans as parties to proceedings under the Act.⁶ Existing law, however, does not authorize the court to order the pension plan to pay costs or fees for litigating issues with which it is concerned.⁷ By allowing the court to order any party to the proceeding to pay costs or fees, Chapter 715 eliminates possible inequities under prior law where efforts to join a pension plan may have been frustrated by lack of statutory authority to order payment of attorney's fees and costs.⁸

Prior law provided that a superior court could order the parties to a proceeding under the Act to pay reasonable costs and attorney's fees during the pendency of the proceeding⁹ and could augment or modify the original award for costs and attorney's fees before the entry of judgment.¹⁰ Prior law has been strictly construed by a California appellate court to authorize payment, modification, or augmentation of fees and costs to apply *only* to pending proceedings and to preclude action upon a motion for fees or costs filed after the appeal has become final.¹¹ Chapter 715 expressly extends the court's authority to award costs and attorney's fees on motions made after an appeal has become final.¹²

Existing law provides that a contract obligation assigned to one party as part of the division of community property might be the basis of a cause of action by a creditor against the other party if the assignee defaults on the obligation.¹³ Prior to the enactment of Chapter 715, an attorney representing a marital party in an action for dissolution or legal separation was required to give written notice to the client of the client's liability.¹⁴ Chapter 715 requires this notice to appear on the face of the interlocutory judgment of dissolution or the final judgment of legal separation,¹⁵ thus protecting clients from counsel who neglect to give clients proper notice and making compliance with the notice requirement more convenient and less expensive for attorneys.¹⁶

5. See 97 Cal. App. 3d at 879, 159 Cal. Rptr. at 86.

6. See CAL. CIV. CODE §4363.1.

7. See *id.*

8. See *id.* §4370(a). See also 97 Cal. App. 3d 876, 159 Cal. Rptr. 84 (1979).

9. See CAL. STATS. 1979, c. 1030, §2, at 3547.

10. See *id.*

11. See *In re Marriage of Kasper*, 117 Cal. App. 3d 118, 172 Cal. Rptr. 449 (1981).

12. See CAL. CIV. CODE §4370(a).

13. See *id.* §4800.6.

14. See CAL. STATS. 1980, c. 329, §1, at — (enacting CAL. CIV. CODE §4800.6).

15. See CAL. CIV. CODE §4800.6.

16. See notes of conversation with Josh Pane, Senator Marks' office, Sept. 30, 1981 (conversation regarding intent of the legislation) (copy on file at the *Pacific Law Journal*).

Finally, prior to the enactment of Chapter 715 courts were required to separate child and spousal support provisions from the other provisions in a support agreement.¹⁷ Chapter 715 codifies the United States Supreme Court decision in *Commissioner v. Lester*¹⁸ that if both parties agree, spousal support and child support may be combined in a single payment as family support.¹⁹ A *Lester* agreement allows the parties to dictate the income tax results of periodic payments by specifying the allocation between spousal and child support payments.²⁰ Under *Lester*, the full amount is treated as spousal support and may be entirely deducted by the payer and taxed to the recipient.²¹ However, the payer's advantage in deducting the combined amount for child and spousal support should be weighed against the possible loss of dependency exemptions for the children.²² The recipient's expenditures for child support are considered contributions from the recipient even though they come out of the family support payment.²³ A parent's eligibility for taking child exemptions largely depends on that parent's contribution in support of the children.²⁴ If the recipient of the family support contributes more child support than the payer, then the recipient will be entitled to the child exemptions.²⁵ Chapter 715 also specifies that the underpayment of any amount due as family support must first be used to satisfy the child support portion of the agreement.²⁶

17. See CAL. STATS. 1970, c. 1545, §4, at 3140 (amending CAL. CIV. CODE §4811).

18. See *Commissioner v. Lester*, 366 U.S. 299, 306 (1961).

19. See *id.* See generally *Support Agreements, Court not Obligated to Make Separate Child Support Order Where "Lester Agreement" Combines Spousal and Child Support*, 1980 CONFERENCE OF DELEGATES OF THE STATE BAR OF CALIFORNIA, Resolution 1-7-80; *Family Support*, 1979 CONFERENCE OF DELEGATES OF THE STATE BAR OF CALIFORNIA, Resolution 2-12-79.

20. See CONTINUING EDUCATION OF THE BAR, CALIFORNIA MARITAL TERMINATION SETTLEMENTS §5.19 (1971).

21. See 366 U.S. 299 (1961).

22. See CONTINUING EDUCATION OF THE BAR, CALIFORNIA MARITAL TERMINATION SETTLEMENTS §5.20 (1971).

23. See *id.*

24. See *id.*

25. See *id.* §§5.36-5.38.

26. See CAL. CIV. CODE §4811(d).

Domestic Relations; summary dissolution of marriage

Civil Code §4550 (amended).

SB 406 (Sieroty); STATS. 1981, Ch 123

Support: State Bar of California

In 1978, a provision for the summary dissolution of marriage was

added to the Civil Code¹ to permit a simple, less expensive, non-adversary dissolution and to reduce the congestion of courts.² In order to be eligible for a summary dissolution, certain conditions must be met.³ Under prior law, if either party held *any* interest in real property, the couple could not qualify for summary dissolution.⁴ Chapter 123 now permits couples to take advantage of the summary dissolution if their *only* interest in real property is a residential leasehold occupied by either party.⁵ The leasehold, however, must not include an option to purchase and must terminate within one year of the filing of the dissolution petition.⁶

1. See CAL. CIV. CODE §§4550-4556.

2. See 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Husband and Wife* §108A (8th ed. Supp. 1980); STATE BAR OF CALIFORNIA, 1980 CONFERENCE RESOLUTION 1-8b-80; 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 442, 443 (1979); Governor Edmund G. Brown, Jr., Press Release, No. 264, Aug. 21, 1978.

3. See CAL. CIV. CODE §4550. (These conditions include, among other things, that there be no children of the relationship; that the marriage be not more than five years in duration; that there be no unpaid obligations in excess of \$3,000; that the total fair market value of community or separate assets must be less than \$10,000; and that the parties must have executed an agreement setting forth the division of assets and liabilities.).

4. CAL. STATS. 1980, c. 627, §1, at —.

5. CAL. CIV. CODE §4550. See generally STATE BAR OF CALIFORNIA, 1980 CONFERENCE RESOLUTION 1-8b-80.

6. See CAL. CIV. CODE §4550.

Domestic Relations; confidential marriage licenses

Civil Code §4213.1 (new); §4213 (amended); Government Code §§26840.1, 26840.8 (amended); Penal Code §360 (amended).

SB 659 (Ellis); STATS. 1981, Ch 872

Support: California State Bar, Family Law Section; Department of Finance; Department of Health Services; Family Service Council of California

Prior to the enactment of Chapter 872, all persons authorized to perform marriages were permitted to solemnize a marriage¹ without obtaining either a marriage license or a health certificate² when two unmarried adult persons, living together as husband and wife sought to

1. See CAL. CIV. CODE §§4205, 4205.1, 4205.5.

2. See *id.* §4213. See generally *id.* §§4000-5138 (California Family Law Act). See also Olson, In Re *Marriage of Carey: The End of the Putative-Meretricious Spouse Distinction in California*, 12 SAN DIEGO L. REV. 436, 436 (1975) [hereinafter cited as Olson]. The California Family Law Act defines marriage as a personal relation arising out of a civil contract, and the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by the issuance of a license and solemnization as authorized by code.

legitimize their relationship.³ The public policy behind the authority to marry without a license was to encourage unmarried persons who had been living together as man and wife to legitimize their relationship by shielding the parties from the publicity of a marriage recorded in the ordinary manner.⁴

Chapter 872 qualifies the authority to perform confidential marriages by requiring that the parties personally appear before a county clerk, a clerk of the court, a judge in chambers, or other person authorized to administer oaths to obtain authorization⁵ for the performance of a confidential marriage ceremony unless either or both of the parties are incarcerated in prison or the county jail or confined to a health care facility.⁶ This authorization must be in a form that requires the parties to declare or affirm that they meet the conditions precedent to a confidential marriage and must be presented to the person performing the ceremony.⁷ In addition, Chapter 872 makes it a misdemeanor to perform a confidential marriage in the absence of this authorization.⁸ Furthermore, Chapter 872 expressly limits confidential marriages to an unmarried man and an unmarried woman, not minors, who have been living together as husband and wife.⁹

Upon performance of the ceremony, Chapter 872 requires the certificate of marriage to be filled out by the parties and authenticated by the person who performed the ceremony.¹⁰ As under prior law, confidential marriage certificates must be filed by the person performing the ceremony with the county clerk¹¹ to be available for public inspection upon court order.¹² Chapter 872 also requires the person performing the ceremony to furnish the parties who were married a copy of the certificate and an application for a certified copy of the certificate.¹³ Clerks now are required to file copies of the confidential certificates

3. See Olson, *supra* note 2, at 452.

4. 32 CAL. JUR. 3d *Family Law* §42 (1977).

5. CAL. CIV. CODE §4213(a) (the authorization and the certificate of marriage shall be incorporated into one document as prescribed by the Registrar of Vital Statistics).

6. See *id.* §4213.1 (if either or both of the parties to be married is physically unable to appear in person, an authorization for the performance of a marriage shall be issued to the person performing the ceremony upon that person's presenting an affidavit to the county clerk signed by the person and the prospective marrying parties explaining the reason for their inability to appear).

7. See *id.* §4213(a).

8. See CAL. PENAL CODE §360.

9. CAL. CIV. CODE §4213(a).

10. *Id.*

11. CAL. PENAL CODE §360 (penalty for failure to file).

12. See CAL. CIV. CODE §4213(a) (the registrar may respond to an inquiry regarding the existence of a marriage performed pursuant to this section, but may not disclose the date of the marriage). Compare *id.* with CAL. STATS. 1980, c. 676, §59, at — (amending CAL. CIV. CODE §4213). See also Olson, *supra* note 2, at 452.

13. CAL. CIV. CODE §4213(a).

periodically with the State Registrar of Vital Statistics rather than reporting the number of certificates filed.¹⁴

14. *Id.* Compare *id.* with CAL. STATS. 1980, c. 676, §59, at — (amending CAL. CIV. CODE §4213).

Domestic Relations; freedom from parental custody and control

Civil Code §§237.5, 239 (repealed and new); §§233, 234 (amended).
AB 344 (Thurman); STATS. 1981, Ch 810

Support: California Association of Adoption Agencies; California State Bar

Existing law permits any interested person to petition a superior court for an order declaring a minor free from the custody and control of his or her parents.¹ Chapter 810 changes these procedures to include an expanded report about the minor by the juvenile probation officer,² new representation requirements for the minor at the hearing on the petition,³ and an interview of the minor by the court if the minor is at least ten years of age.⁴

Upon the filing of the petition to declare a minor free from parental custody and control, a juvenile probation officer or the county department designated to administer the public social services program is required to investigate and report to the court the circumstances of the petition⁵ and any recommendations for the proper disposition of the minor.⁶ Chapter 810 broadens the scope of the report to include the following: (1) either a statement that the minor was informed of the nature of the action to end parental custody and control or a statement of the reasons why an explanation was not given;⁷ (2) the minor's feelings and thoughts on the legal action;⁸ (3) the minor's attitude toward his or her parents and any preference for living with a parent or parents;⁹ and (4) a statement that the minor was informed of his or her

1. See CAL. CIV. CODE §§232, 233. See generally 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Parent and Child* §§111-112 (8th ed. 1974).

2. See CAL. CIV. CODE §233.

3. See *id.* §237.5.

4. See *id.* §234.

5. See *id.* §232 (conditions which must be met for a petition to be filed).

6. *Id.* §233.

7. *Id.* §233(a) (an explanation is not necessary if the emotional or physical condition or age of the minor would make the explanation impossible or harmful to the best interests of the minor).

8. *Id.* §233(b).

9. *Id.* §233(c).

right to attend the hearing on the petition.¹⁰

Prior to the enactment of Chapter 810, the judge read the petition to the parents at the hearing and could explain to the minor the effect of granting the petition.¹¹ On the request of the minor or the parents, the judge was required to explain the nature of the proceeding, the procedures of the court, the possible consequences of the action, and any terms in the petition.¹² In addition, the judge determined whether the minor and the parents had been informed of their rights to be represented by counsel.¹³ At the discretion of the court, counsel could be appointed by the court for the minor.¹⁴ Existing law requires the court to appoint counsel for indigent parents unless waived.¹⁵ Chapter 810 revises and clarifies these procedures regarding the minor.¹⁶ With the enactment of Chapter 810, the court must consider whether the interests of the minor require protection by the appointment of counsel.¹⁷ The court must appoint counsel if necessary, although the same counsel may not be appointed to represent both the minor and the minor's parents.¹⁸ Chapter 810 also prohibits the minor's presence in court for the appointment of counsel unless the minor requests to attend or the court orders attendance.¹⁹

After the filing of the petition, existing law requires that a citation be issued directing any person having the custody of the minor or with whom the minor resides to appear with the minor at the time and place stated in the citation.²⁰ Under prior law, a minor under the age of twelve did not have to appear except upon an order of the court after necessity was shown.²¹ Chapter 810 excepts only minors under ten years of age from the requirement of appearing absent a court order.²² In addition, in response to recent case law,²³ Chapter 810 requires that a minor who is at least ten years old be interviewed by the court in chambers regarding the minor's feelings and thoughts concerning the

10. *Id.* §233(d).

11. CAL. STATS. 1974, c. 246, §3, at 458 (amending CAL. CIV. CODE §237.5).

12. *Id.*

13. *Id.*

14. *Id.*; see *In re Dunlap*, 62 Cal. App. 3d 428, 438, 133 Cal. Rptr. 310, 315 (1976). But see *In re Richard E.*, 21 Cal. 3d 349, 355, 579 P.2d 495, 499, 146 Cal. Rptr. 604, 608 (1978).

15. CAL. CIV. CODE §237.5(b).

16. Compare CAL. STATS. 1981, c. 810, §3, at — (repealing and adding CAL. CIV. CODE §237.5) with CAL. STATS. 1974, c. 246, §3, at 458 (amending CAL. CIV. CODE §237.5).

17. CAL. CIV. CODE §237.5(a).

18. *Id.* §237.5(b).

19. *Id.* §237.5(a).

20. See *id.* §234.

21. CAL. STATS. 1974, c. 246, §2, at 458 (amending CAL. CIV. CODE §234).

22. CAL. CIV. CODE §234.

23. See *In re Jake H.*, 106 Cal. App. 3d 257, 269, 165 Cal. Rptr. 646, 653 (1980).

custody proceedings,²⁴ the minor's parent or parents,²⁵ and the minor's preference regarding custody.²⁶ The interview may be waived only if the minor is represented by counsel.²⁷ The court also must inform the minor of the right to attend the hearing on the petition.²⁸

When the minor is declared by order or judgment of the court to be free from the custody and control of both parents, existing law permits the court to appoint a guardian of the minor.²⁹ Chapter 810 provides alternatives to appointing a guardian by authorizing the court to refer the minor to a licensed adoption agency for adoption under certain conditions³⁰ or, if a petition for adoption is pending, to place the minor or require the minor to remain in a foster home.³¹ After a referral to an adoption agency, the adoption agency has custody and control of the minor until the minor's adoption.³² A petition for guardianship may not be filed without the consent of the adoption agency.³³ Chapter 810 prohibits adoption of the minor until the appellate rights of the parents have been exhausted.³⁴

24. CAL. CIV. CODE §234(a).

25. *Id.* §234(b).

26. *See id.* §§234(c), 4600.

27. *Id.* §234(c).

28. *Id.*

29. *Id.* §239(a).

30. *Id.* §239(b) (the court may refer the minor to an adoption agency at the request of the State Department of Social Services or to a licensed adoption agency if it is in the minor's best interest).

31. *Id.* §239(b), (c).

32. *Id.* §239(b).

33. *Id.*

34. *Id.*

Domestic Relations; adult adoptions

Civil Code §227p (amended).

AB 301 (Alquist); STATS. 1981, Ch 734

Support: Department of Social Services

Existing law permits any adult to petition a superior court for the adoption of a younger adult.¹ Chapter 734 imposes the requirement that the petition include (1) the length and nature of the relationship between the petitioner and the proposed adoptee, (2) the degree of kinship, (3) the reasons for the adoption and why the adoption would be

1. *See* CAL. CIV. CODE §§221, 227p. *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Parent and Child* §211 (8th ed. 1974); 32 CAL. JUR. 3d *Family Law* §79 (1977).

in the best interests of the petitioner, the proposed adoptee, and the public, (4) the names and addresses of any living parents or adult children of the proposed adoptee, and (5) the name of any person previously adopted by the petitioner and the petitioner's spouse and the date and place of that adoption.²

At the hearing on the petition for adoption, existing law requires the court to determine from an examination of the parties or counsel of any party not present that the adoption is in the best interests of the parties and the public.³ For this determination, Chapter 734 allows the court to consider all evidence, oral or written, specifically including evidence that is not in conformity with the Evidence Code.⁴ Chapter 734 prohibits any person from adopting an unrelated adult within one year of another adult adoption by that person or his or her spouse unless the adult to be adopted is the sibling by birth of an adult previously adopted or is disabled or physically handicapped.⁵

In addition, Chapter 734 provides that any adopted adult may file a petition⁶ to terminate the relationship of parent and child after written notification to the adoptive parent.⁷ The court may order the adoption agreement terminated without further notice if the adoptive parent consents in writing.⁸ Absent written consent of the adoptive parent, a verified written response must be filed within thirty days of the mailing of the notification to the adoptive parent.⁹ After the verified written response is filed, the court may order an investigation of the circumstances underlying the petition by the county probation officer or the State Department of Social Services.¹⁰ A court hearing on this petition to terminate is required by Chapter 734.¹¹ Finally, Chapter 734 provides that hearings on adult adoption or on termination of a parent-child relationship may be open to the public at the discretion of the court.¹²

2. CAL. CIV. CODE §227p(b)(1).

3. *Id.* §227p(a).

4. *Id.* §227p(b)(4).

5. *Id.* §227p(b)(2).

6. *See id.* §227p(b)(5) (contents of petition).

7. *Id.*

8. *Id.*

9. *Id.* §227p(b)(6).

10. *Id.*

11. *Id.*

12. *Id.* §227p(b)(3).